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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 324.

JAMES C. B. MILLARD, as Executor of the Will of Jay Gould, deceased,

Petitioner,

vs.

HARRY A. MALONEY,

Respondent.

REPLY BRIEF FOR PETITIONER.

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I.

As to the Trust Fund.

Counsel for the respondent in their brief in opposition attempt to dispose of *Helvering* v. *Helmholz*, 296 U. S., 93, upon which we strongly rely. We refer particularly to page 9 of their brief in *Chickering* v. *Helvering*, No. 153, which is incorporated by reference in their brief in opposition in this case. Realizing, no doubt, the devastating effect of the fact that in *Helvering* v. *Helmholz* the decedent had a general power to appoint for life to any natural person, counsel try to distinguish that case. They say that the Commissioner did not appeal from the Board of Tax Appeals holding that the life interest appointed by the decedent should

not be included in the gross estate. In the first place the opinion of the Court of Appeals clearly shows that what was not appealed was the Board's ruling that the appointed life estate was not included on the ground that the power was a special rather than a general power. That is an entirely different question. Be that as it may, it is an inescapable fact that the power existed and was exercised. Nevertheless, this court held that the decedent did not retain sufficient control until death to make (d) applicable retroactively without violating the Fifth Amendment. In so holding this Court could not disregard that power. It was mentioned in the opinion 296 U. S., at pages 94 and 96.

Counsel also says that the effect of that power was not argued in the briefs in this court. Again we say the power was there and it cannot be assumed that this court overlooked it. Moreover, what is or is not said in briefs or oral argument is no guide to the inferior courts or to counsel seeking to advise in subsequent cases.

We submit this court should not overlook that until the first enactment of (d) in 1924 the Federal Estate Tax was a tax upon the right to *give* and not upon the right to *receive*. So this Court held in *Knowlton* v. *Moore,* 178 U. S., 41; *Edwards* v. *Slocum,* 264 U. S., 61, and *Nichols* v. *Coolidge,* 274 U. S., 531, 537. The tax remains such except insofar as thereafter changed by amendments. This Court indicated such a change in *Helvering* v. *City Bank Farmers Trust Company,* 296 U. S., 92, where the amendment (d) was under consideration:—

> "It was appropriate for Congress to prescribe that if, subsequently to the passage of that Act, the creator of a trust estate saw fit to reserve to himself jointly

> with any other person the power of revocation or alteration, the transaction should be deemed to be testamentary in character, that is, *treated for the purposes of the law as intended to take effect in possession or enjoyment at the death of the settlor.*" (Italics ours.)

The amendment (d) thus supplies the *legal intent* to make the transaction deemed as one to take effect at death —a tax on the right to receive.

At the same time the City Bank Farmers Trust Co. case was decided this Court also decided *Helvering* v. *Helmholz,* 296 U. S. 93, holding that the Amendment (d) could not be applied retroactively. And yet, in spite thereof, the Circuit Court of Appeals thereafter, in passing on the taxability of irrevocable transfers made prior to its enactment, construed such transfers in the light of the phraseology of amendment (d) as though the phraseology of (d) had always been a part of the law,—retroactive application nonetheless. *Commissioner* v. *Chase Bank,* 82 Fed. 2d, 157; *Witherbee* v. *Commissioner,* 70 Fed. 2d, 696; *Cook* v. *Commissioner,* 66 Fed. 2d, 995; and the case at bar. That was due to the fact that the Circuit Courts of Appeals in those cases misconstrued this Court's real ground for holding the transfers in *Porter* v. *Commissioner,* 288 U. S., 436, taxable. The Government has consistently cited the Porter decision in this Court in cases where the question of retroactive application of the amendment (d) was in question. But this Court has never taken that position. This has led to a great deal of confusion which should be clarified by this Court.

The Government in its brief in *Hassett* v. *Welch,* 303 U. S. 303 presented to this Court the opportunity to hold

the Federal Estate Tax generally in the nature of certain state transfer tax acts where the tax is on the right of the beneficiary to receive. The point under consideration there was whether the joint resolution of Congress of March 3, 1931, taxing transfers as intended to take effect at death where a life estate was retained, was applicable. This Court there held that that amendment was intended to be applied prospectively only. It did not pass upon the point above mentioned presented to it by the Government. Had this Court been favorable thereto, a splendid opportunity was thereby presented to it to hold the transfer there taxable.

The opinion of the Circuit Court of Appeals for the First Circuit in *Chickering* v. *Commissioner,* 118 Fed. 2d, 254 is inconsistent with the above, and the confusion which it presents should now be clarified by this Court. *Chickering* v. *Commissioner* relies mainly on earlier cases. Either those cases are not in point or they are misconstrued. One of the cases principally relied on is *Tyler* v. *U. S.,* 281 U. S., 497, which held taxable the survivor's acquisition in a tenancy by the entireties. It clearly appeared from the opinion of Mr. Justice Sutherland, at page 500, that the estate by the entireties was created after the passage of the applicable Act. That case, therefore, can have no bearing on the case at bar, where the deed of trust took effect prior to the original enactment of sub-division (d) in 1924.

Hobitzelle v. *U. S.,* 3 Fed. Supp. 331 (Court of Claims). Here too the trust was created in 1927 and after the enactment of subdivision (d). Furthermore, the decedent reserved power of control almost the substantial equivalent of that reserved by the decedent in *Porter* v. *Commissioner,* 288 U. S., 436.

Holderness v. *Commissioner,* 86 Fed. 2d, 137, was also a case where the trust was created in 1929, and therefore after the enactment of subdivision (d).

The Circuit Court of Appeals in the Chickering case also relied on *Porter* v. *Commissioner,* 288 U. S., 436. Its error in relying on that case is in failing to see that the true foundation of the decision of this Court in that case (as pointed out in our main brief) is that the power reserved by the decedent in the Porter case was so extensive as to be the substantial equivalent of continued ownership until date of death. In the Chickering case the power was simply to select among a small group of beneficiaries. This is far from the equivalent of continued ownership, and far from making the decedent dominant with respect to the trust. In reaching this interpretation of *Porter* v. *Commissioner,* the Court of Appeals in the Chickering case attempted to distinguish and escape the force and effect of *Helvering* v. *Helmholz* by ignoring or overlooking the fact that in the Helmholz case the decedent had a general power to appoint for life to any natural person. As we have said, the decision in the Helmholz case is such a gloss upon the Porter case as conclusively to establish the real meaning of the Porter case, as requiring the reserved control to be the substantial equivalent of continued ownership, the retention by the decedent of a dominant position. If the power to appoint for life to any natural person is not the equivalent of continued ownership, then neither is the special power to allocate the shares of the corpus among the small class of descendants, as in the case at bar. Decisions such as that of the Circuit Court of Appeals for the First Circuit in the Chickering case, and that of the court below in this case,

show, however, that the true intent and meaning of the Porter case is not clear to the Circuit Courts of Appeal. We earnestly urge that it is the duty of this Court to exercise its supervisory jurisdiction and clarify the situation.

II.

As to the payments pursuant to the New York judgment.

Here counsel seek to distinguish *Bull* v. *United States,* 295 U. S., 247. See page 10 of this brief. In our case, as in *Bull* v. *United States,* no capital fund has been contributed or set up. The moneys are payable to the decedent's executor, in the Bull case pursuant to a partnership agreement, in ours pursuant to a stipulation confirmed by a judgment. In the Bull case the moneys were produced by the activities of the surviving partners, in ours by the activities of the payors, Helen and Howard, in diverting a portion of their income, whether earned or otherwise, to making the payments. Surely the cases are on all fours.

Respectfully submitted,

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